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CHARLES ELMORE CRO

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 412.

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT,

vs.

STATE HIGHWAY COMMISSION,
APPELLEE,
(Petitioner).

PETITION FOR REHEARING.

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KELLEY BRIEF PTG. CO., TOPEKA

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Comes now the above named appellee, the State Highway Commission of Kansas, and presents this, its petition for a rehearing, in the above entitled cause, and in support thereof respectfully shows:

The opinion of this court delivered on April 1, 1935, seems to turn entirely on a question of substantive law. The determination is that the pipelines and polelines of appellant, when located on private easements, are not subject to the exercise of the police power for the present purposes of the State Highway Commission of Kansas. The court determines that insofar as the questioned statute relates to highways to be relocated or laid out

in the state over land burdened by private easements of appellant, that the statute is in violation of the due process clause of the 14th amendment to the constitution of the United States. Appellee respectfully states that the brief of the appellant, filed in this court on December 3, 1934, in reality presents but two questions,

1. Whether the challenged statute is invalid because of its failure to provide for notice and a hearing to be had before the State Highway Commission prior to the issuance of an order requiring structural changes in transmission lines, such as those owned by the appellant;

2. Whether the statute denied appellant the equal protection of the law.

The latter question was not seriously presented either in oral argument or in the briefs filed. Appellee filed its brief herein and dealt almost exclusively with the questions presented by the brief of the appellant. A very short statement was inserted in the back of appellee's abstract on the question of whether or not the statute was a valid delegation of the police power. On the day prior to the argument herein, appellant filed a reply brief wherein it treated more at length the question of whether there had been a valid delegation of police power, however, from the cases cited, appellee concluded that the brief contained a confusion of the power of eminent domain and police power and its only attempt to answer this argument was in the oral argument herein.

Appellee therefore respectfully submits that the principal question upon which this case was decided has not

been fully briefed by either party and that it is apparent from the briefs of the parties as well as the admissions contained in the appellant's answers to the alternative writ of mandamus issued in the lower court that both parties believed that the subject was properly one for legislative action.

The opinion in this case contains the following:

> "The record fails to disclose that appellant's lines were the cause of serious danger to the public. Whatever of this, if any, would follow extensions of the highways across them is not comparable to the hazard incident to the operation of railroad trains."

Again,

> "The rule in respect of railroad crossings applies when there is substantial risk of injury to the public from the operation of trains, and ground to imply the company's consent to take such measures as may be necessary to prevent the hazard. This court has not sanctioned extension of the rule to wholly dissimilar circumstances; it does not apply to structures which are unattended by serious danger to the public."

> "New Orleans v. Drainage Commission, 197 U. S. 453, and similar cases concerning pipes in public streets are not controlling. In them the pipes were laid upon agreement, actual or implied, that the owner would make reasonable changes when directed by the municipality."

We wish to submit that there is nothing contained in the record about the "seriousness" of the danger involved, however it was admitted that the changes contemplated were necessary in the interest of public safety if highways were to be constructed and opened to the

public. Further, the necessity for the construction of the new highways and for the widening of existing highways was expressly admitted. The danger involved results only from improper construction or location of pipe or pole lines where the land occupied is burdened by both pipeline (or poleline) and highway easements. This court says:

> "The 24-inch high pressure natural gas transmission line of appellant, when buried beneath the surface of such highways, certainly is not a constant hazard to vehicular traffic."

The appellee in this case is attempting to avoid any constant hazard to vehicular traffic by requiring the lines to be buried beneath the surface of such highway to such a depth as to remove the hazard and also to require such line to be encased to avoid danger incident to open excavations necessary to pipeline repairs or removal. In the briefs and arguments, all parties seemed agreed that the changes sought to be required are necessary and if this case is to turn on the degree of danger involved, we respectfully submit that that question is properly a question of fact to be determined as other facts.

Natural gas is ordinarily and quite universally considered by the courts as a dangerous instrumentality. A few days before this case was argued in this court, and specifically on February 1, 1935, three of appellant's employees were killed because the 24-inch pipeline burst at a point near Minneola, Kansas. It is our understanding that the pipeline was being uncovered for some

purpose and that it burst from pressure within. Accidents similar to the one mentioned are more or less familiar to all people who live within the gas producing portions of the United States.

The matter of requiring, as a prerequisite to the exercising of the police power of the state, a finding of "serious danger" comparable to that assumed to exist at railroad crossings is a new thing in law, an apparent departure from established precedent and a matter of vital public concern.

In the recent case of Nashville, Chattanooga & St. Louis Railroad vs. Walters, Case No. 183, October Term, 1934, 79 L. ed. 458, 55 Sup. Ct. 486, head note #4 is as follows:

> "Police power embraces regulations designed to promote public convenience or general welfare and not merely those in the interest of public health, safety and morals."

We take this to be the general rule and that this case is the first one wherein the finding of "serious danger" has been deemed necessary.

The case of Erie Railroad v. Board of Utility Commissioners, 254 U. S. 394, is the consolidated opinion in eight cases coming to this court from the State of New Jersey on eight writs of error. The cases are all disposed of in one opinion. From what appears in the reports it would seem that the private easements of a water company were involved; that the private wires of the Western Union Telegraph Company were involved; that certain private spur tracks and loading facilities

were involved; all of these cases arising out of one railroad grade crossing elimination project. The cases were all treated exactly alike in this court. The same principles were applied to the pipes and poles as to the railroad company and to the other interested parties.

The case of C. B. & Q. Railroad Company v. Illinois, 200 U. S. 561, involves the action of a certain board of drainage commissioners who were engaged in deepening the channel of a natural watercourse. This plan necessitated the replacement of a bridge that was part of the railroad company's property. This bridge supporting the railroad tracks had been built for about forty years and was in all respects sufficient when built. We quote from the opinion of the majority of this court, on page 592:

> "The learned counsel for the railway company seem to think that the adjudications relating to the police power of the state to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well being of the community apart from any question of the public health, the public morals, or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the commissioners will reclaim the lands of the district, and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public

> health, the public morals, or the public safety. Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 292, 43 L. ed. 702, 704, 19 Sup. Ct. Rep. 465; Gilman v. Philadelphia, 3 Wall. 713, 729, 18 L. ed. 96, 100; Pound v. Turck, 95 U. S. 459, 464, 24 L. ed. 525, 527; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 470, 24 L. ed. 529."

Mr. Justice Brewer dissented on the ground that the railroad company was receiving no benefit from building a larger bridge and that it was being charged with the cost of reconstruction, about $13,000, all "in order to improve the value of lands belonging to private owners in this drainage district, when, if a highway crossed at the same place and a new bridge or culvert was required, the cost of it would be paid out of the public funds. I cannot conceive how this can be looked upon as "the equal protection of the laws"

The dissent, therefore, was not based on the due process clause.

The case of West Chicago Street Railway Company v. Illinois, 201 U. S. 506, held:

> "A judgment requiring a railroad company to lower or remove a tunnel under a navigable river, which when constructed did not interfere with navigation but which at present obstructs navigation by larger vessels, does not impair any contract obligation, when the ordinance under which the tunnel was constructed contained no clause or provision which so restricted the power of the city that it could not require the railroad company to lower or remove the tunnel when the public interests, as involved in the unobstructed navigation of the river, demanded that to be done."

The court said at page 526:

> "This cannot be deemed a taking of private property for public use or a denial of the equal protection of laws within the meaning of the constitution, but is only the result of the lawful exercise of the governmental power for the common good."

The general principle was stated in the now famous case of C. B. & Q. Railroad Company v. Chicago, 166 U. S. 225. The court said on page 252:

> "The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable regulations to protect the lives and secure the safety of the people. In the recent case of New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 567 (38: 269, 273), this court declared it to be thoroughly established that the inhibitions of the Constitution of the United States upon the impair-

> ment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. 'The governmental power of self protection', the court said 'cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.' See New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650, 671 (29: 516, 524)."

The requirement of the drainage board for a larger bridge under the tracks of the railroad company in order to permit drainage of low, swampy lands, as required in C. B. & Q. Railroad Co. v. Grimwood, supra, did not involve any question of the seriousness of supposed danger to the public and the lack of such danger was admitted. Also in West Chicago Street Railway v. Illinois, supra. There can hardly be said to be any serious danger to the ordinary traveling public in the existence of the street railway company's tunnel under the river, which tunnel ~~had~~ been sufficient for public purposes for many years and became insufficient only because of the increased size of vessels desiring to navigate the river in question. Such is the case at bar. The highways which the appellee is now building were not necessary when the original highways were laid out. Public safety and public convenience have now required that new highways be built and that old highways be straightened and widened in order to accomodate modern vehicular traffic. The appellant, pipeline company, ac-

cepted its franchise from the state, well knowing that such changes would of necessity be made. It accepted its franchise knowing that it must cross public highways and public property and well knowing that unless properly constructed along public highways, its lines would be dangerous to the traveling public. It was recognized that similar changes would have to be made. The company obtained its charter subject to the statute now complained of. This fact was admitted in oral argument. A very common highway problem is dealt with in the statutes in many states, which provide that the owners of hedge fences adjoining public highways, shall keep them trimmed. As stated by the Supreme Court of Kansas in Chaput v. Demars, 120 Kan. 273, 275:

> "Why trim hedges along public highways? High hedges obstruct the highways, causing snow to drift in them, prevent their drying out quickly after heavy rains, render the highways more difficult to keep in proper condition, obstruct the view and render them more dangerous. The state, under the exercise of its police power, may legislate to remedy all the conditions produced by high hedges.
>
> The law does not take property without due process of law, and does not deny the equal protection of the law. It does compel an owner of a hedge to keep it in a certain condition at a place where that property affects the public roads, and if he will not do so then the public authorities may do it for him and tax him with the cost of performing the labor."

Such statutes have been uniformly held to be proper exercise of the police power and certainly if the law is to be that the police power could be exercised for

the benefit of public highways only when there is an element of serious danger comparable with the assumed danger at railroad grade crossings, then all such statutes are unconstitutional as in violation of the due process clause. We assume that it will also follow that statutes requiring the gasoline pumps of filling stations to be erected at least a certain number of feet from the edge of the highway right of way may be also unconstitutional as presenting no problem of serious danger comparable with railroads projecting their new superdreadnaught trains over the country and across country roads. There is an endless chain of probable conditions which will give rise to serious conflict, public inconvenience and public hazard, if the exercise of police power is to be limited to circumstances comparable with those existing at grade crossings. It may be well argued that it is generally true when a motor vehicle is struck on a grade crossing, it is usually the fault of the driver, while when people are injured by fallen wires or natural gas explosions, they are usually injured by virtue of the sole fact that they were present at the time of the accident.

For the foregoing reasons, it is respectfully urged that this petition for rehearing be granted and that the judgment of the Supreme Court of the State of Kansas be, upon further consideration, affirmed.

Respectfully submitted,

WINT SMITH, Topeka, Kansas,
OTHO W. LOMAX, Topeka, Kansas,
Counsel for Appellee.

CERTIFICATE OF COUNSEL.

I, Wint Smith, counsel for the above named State Highway Commission of Kansas, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WINT SMITH,
Counsel for Petitioner.